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No. 93-292

In The

Supreme Court of the United States

October Term, 1993

MARK H. FOGEL, JEM MANAGEMENT ASSOCIATES CORP., FREDERICK M. MINTZ and JUDITH REAUME,

Petitioners,

vs.

ALLEN KOPELSON, HERBERT H. LEVESS and ALEX ZUPNICK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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I

Attorneys for Respondents have submitted a brief in opposition to Petitioners' Petition for a Writ of Certiorari which contains numerous errors which if not corrected could mislead this Court with respect to a number of key facts which are fundamental to Petitioners' position. The issues raised by Respondents will be answered in the order in which they were raised.

I.

PETITIONERS HAVE GIVEN VALID REASONS FOR THIS COURT TO GRANT REVIEW OF THE ORDER OF THE CIRCUIT COURT.

The Petitioners have raised the issue of the failure of the District Court and subsequently the United States Court of Appeals for the Second Circuit to address the issue of the Petitioners' standing to object to (A) the fairness of the settlement, (B) the improper procedure with respect to the approval of the settlement and (C) the failure of the District Court to provide Petitioners with due process by taking away their property rights without a full hearing before a jury. Without repeating the arguments which are set forth in the original Petition, it is clear that the non-settling defendants (Petitioners herein) had a property right in the 79th Street Parking Garage and, accordingly, had a potential financial gain from the operation and potential transfer of the 79th Street Garage.

The Respondents have failed to recognize that the settlement in this matter was conditioned upon the approval and settlement of the companion *Sperber Adams* case and therefore the issue of the disposal of the 79th Street Garage was more extensively discussed in the brief in the *Sperber Adams* case in view of the fact that the 79th Street Garage was the subject of that transaction. However, both matters must be viewed together in view of the interdependency of the settlement of both matters.

II.

THE RESPONDENTS FAILED TO VALIDLY DEFEAT THE INTERESTS OF THE NON-SETTLING DEFENDANTS WHO HAVE STANDING TO APPEAL.

In the Petition, the Petitioners clearly point out that the 79th Street Garage had value to the settling defendant, Stanley Muss. It is logical and obvious that this had value to him and it was utilized as part of the consideration to him and was a key element in the settlement. In fact, the payment by Muss of an aggregate of $850,000 to settle both this matter and the *Sperber Adams* matter should be viewed as a partial payment for the return of the 79th Street Garage and partial payment for the settlement of the damages alleged by the plaintiffs. This is an operating garage with substantial monthly revenues for which the District Court failed to have an evidentiary hearing to determine the value. Some portion of the value of such garage is obviously attributable to the non-settling defendants with respect to their interest as general partners of the partnership holding the leasehold interest.

III.

THE LACK OF FAIRNESS OF THE SETTLEMENT WAS NOT REVIEWED NOR PROPERLY RULED UPON BY THE COURT BELOW.

The Respondents wrongfully state that the Petitioners never raised the question of the fairness of the settlement in the District Court and therefore those issues are not subject to review by this Court. I am attaching as Appendix A to this Reply, a copy of a letter dated June 22, 1992 from the law firm of Kostelanetz, Ritholz, Tigue & Fink, which at the time was counsel to the non-settling defendants, in which the non-settling defendants' objections to the settlement were set forth. Although such letter speaks for itself and

sets forth a number of objections, in particular, it states the objection that "the settlement is not a fair and equitable settlement for either the plaintiffs or the Non-settling Defendants". Further, the letter points out that the condition which the District Court itself set forth as a condition for the settlement, *i.e.* the District Court determining "that the settlement is fair, reasonable and adequate" was never properly met. In fact, no basis was given for the District Court's decision.

The District Court failed to set forth any justification to support its determination to approve the partial settlement without a full evidentiary hearing and without a finding of fact by a jury as to any wrongdoing by the non-settling defendants and by accepting unsupported statements as to Stanley Muss' financial condition and the lack of value of the garage by the receiver. The Petitioners are entitled to an opportunity to cross-examine any witness giving such testimony and to have the entire question determined by a jury.

Respondents argue that Petitioners' position that they were deprived of the 79th Street Garage without due process, is an invalid point due to Respondents' claim that Muss could have terminated the subject lease. However, as Respondents point out in footnote "1" on page "2" of their brief, defendants Fogel, Reaume and Muss were recently indicted by a New York County grand jury with respect to their alleged conduct involving the underlying transaction. The indictment of Muss and his wrongdoing in this transaction would have prevented him from terminating the lease due to the default in the payment of rent by the Limited Partnership which would have raised the defense of the fraudulent acts of Muss. Muss would not have been allowed to enforce the lease due to his fraudulent acts and profit from such acts at the expense of the partnership.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — LETTER DATED JUNE 22, 1992 FROM THE LAW FIRM OF KOSTELANETZ RITHOLZ TIGUE & FINK TO HONORABLE JOHN S. MARTIN, JR.

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June 22, 1992

BY HAND

Hon. John S. Martin, Jr.
United States District Judge
Southern District New York
Foley Square
New York, New York 10007

Re: Sperber Adams Associates, et al. v. Jem Management Associates Corp., et al.
90 Civ. 7405 (JSM)

Zupnick, et al. v. Jem Management Associates Corp. et al. 89 Civ. 6607 (JSM)

Appendix A

Dear Judge Martin:

We hereby respectfully submit out objections to the proposed settlement in the above-referenced actions between plaintiffs and defendant Stanley Muss on behalf of defendants Jem Management Associates Corp., Jem Parking Management Corp., Mark Fogel, Judith Reaume, Frederick M. Mintz and Mintz & Fraade, P.C. (collectively the "Non-settling Defendants").

Paragraph 5 of Part II of the Notice on the Proposed Partial Settlement (the "Notice") states:

> Settlement is contingent on the District Court making a determination (a) that the Settlement is fair, reasonable and adequate and (b) that all claims for contribution or indemnification, however denominated, against the Settling Defendant arising under federal laws or state laws in favor of persons, including the non-settling defendants who are asserted to be joint tortfeasors with the Settling Defendant in the Settled Claims, and based upon liability on the Settled Claims are extinguished, discharged, satisfied and/or otherwise unenforceable.

This is not a typical settlement. The proposed settlement does not provide solely for the payment of monies. It also provides for the return of the 79th Street Garage to Mr. Muss. In effect, the settlement would return the garage to Mr. Muss without the approval of all interested parties and without compensating all of the interested parties. The garage is owned by a limited partnership and is being transferred, and the rights of the Partnership in the garage are being terminated, without the consent of all the partners

of the Partnership and without an adjudication of liability on the part of the excluded partners. In fact, the proposed settlement provides that the excluded partners will not receive any portion of the money which is being paid by Mr. Muss. The excluded partners are entitled to a determination by a jury of the question of their liability.

A review of the facts makes it clear that the settlement is not a fair and equitable settlement for either the plaintiffs or the Non-settling Defendants. The Non-settling Defendants are either the corporate general partners or shareholders of the corporate general partners in the subject partnerships. As such, they have a continuing interest in the partnerships and the assets of the partnerships. How can their interest in the 79th Street Garage be given away without either their consent or a determination by a jury of the question of their liability?

Stanley Muss has acknowledged receiving net proceeds from the sale of the relevant leases for the Thompson Street and the 79th Street Garages, after the payment of any brokerage fees, of $2,200,000. In addition, Mr. Muss received rental payments of in excess of $325,000 for the 79th Street Garage from the 79th Street Partnership. Clearly, Mr. Muss received more money from these transactions than anyone else. Mr. Muss is now paying an aggregate of $850,000 to settle the claims against him in both matters and is *receiving the lease on the 79th Street Garage.* In addition, he has previously been released from any obligation to pay rent for the Thompson Street Garage which was apparently losing money.

It should be noted that there has been no finding of Mr. Muss' financial condition or ability to satisfy a judgment in an amount greater than the settlement. There has not been an opportunity to

examine Mr. Muss with respect to his financial condition. Accordingly, it is respectfully submitted that the Court should not consider his alleged financial condition in determining whether the settlement is satisfactory.

The net result to Mr. Muss is the following: (1) he will continue to own one of the garages, (2) he will be released from liability for the payment of rent on the garage which was apparently losing money and (3) he will retain in excess of $1,675,000.00 from the net amounts which were paid to him from the two garages.

Finally, it should be noted that the Non-settling Defendants have interposed two cross-claims against defendant Stanley Muss based upon his materially false fraudulent misrepresentations to the Non-Settling Defendants with respect to the sale of the subject garages. The claims of the Non-Settling Defendants are not merely claims for contribution. They have direct claims against defendant Muss which are not limited to the question of whether they are joint tortfeasors, i.e., the Non-Settling Defendants have been damaged by Defendants Muss' action, regardless of whether the Non-Settling Defendants have any liability to the Plaintiffs. Accordingly, the conditions of Paragraph "5" of the notice as set forth above, have not been met and preclude the approval of the settlement.

Based upon all the foregoing, the Non-Settling Defendants respectfully request that the settlement between plaintiffs and defendant Stanley Muss be rejected by the Court.

Appendix A

Respectfully submitted,

Mintz & Fraade, P.C.

Kostelanetz Ritholz Tigue
& Fink

By: s/ Robert S. Fink
Robert S. Fink

cc: All Counsel